

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERRY DAVID BYERS)	
Claimant)	
VS.)	
)	Docket No. 173,408
MORTON BUILDINGS, INC.)	
Respondent)	
AND)	
)	
INSURANCE COMPANY OF NORTH AMERICA)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The application of respondent for review of an Award entered by Administrative Law Judge Floyd V. Palmer on August 11, 1995, came on for oral argument before the Workers Compensation Appeals Board.

APPEARANCES

Claimant appeared by and through his attorney, Lawrence M. Gurney of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Vincent A. Burnett of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, John C. Nodgaard of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board finds the Award of the Administrative Law Judge should be affirmed. The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The findings and conclusions enumerated in the Award of the Administrative Law Judge are both accurate and appropriate and the Appeals Board adopts same as its own findings and conclusions as if specifically set forth herein as to the issue raised.

Respondent contests claimant's award of work disability in this matter arguing that the claimant's preexisting limitations from an injury suffered in 1983 should be taken into consideration in assessing claimant's inability to obtain work in the open labor market and earn comparable wages. This argument is rejected by the Appeals Board. The analysis of this issue as contained in the Appeals Board decision of Flores v. Cameron Drywall, Docket No. 152,948 (January 1994) is applicable to the facts of this case. In Flores, claimant had filed a prior workers compensation claim in Missouri after suffering an injury to his left knee. This injury was settled following which he continued working as a dry wall finisher. He began working for respondent in 1985. In March 1990, claimant suffered an injury when he was attempting to move a water barrel. He fell from the back of a pickup truck and landed on both feet, causing symptoms to both of his knees. Thereafter, it became difficult for claimant to work his usual hours and he was eventually forced to terminate his employment. In arguing against claimant's entitlement to work disability in Flores, the respondent cited the fact that claimant had been placed under work restrictions prior to his subsequent injury. These work restrictions were very similar to those placed on claimant after the most recent injury. The Appeals Board found it significant that claimant had returned to employment as a dry wall finisher and was able to perform his duties at a comparable or greater wage for several years. The fact that claimant was able to work as a dry wall finisher, contrary to the earlier restrictions, indicated that those restrictions were inappropriate when given.

The logic of Flores applies to the facts of this case. Here, the claimant suffered an injury in 1983 causing him to terminate his employment with Powers Roofing Company. Thereafter, claimant attended truck driving school and began driving trucks in 1985. Even though claimant was under specific work restrictions including limitations to his ability to lift and repetitively bend and stoop, claimant voluntarily performed his work duties outside of those restrictions for several years. Claimant worked for respondent from January 1989 until the injury in August 1992. During this time claimant voluntarily exceeded the restrictions earlier placed upon him, indicating the earlier restrictions were inappropriate. The Appeals Board found in Flores that to deny claimant a work disability based upon the prior work restrictions that claimant did not follow and worked outside for several years would have the undesired effect of discouraging injured workers from returning to work by further penalizing them if they were re-injured after doing so. In this instance, to penalize claimant by applying the prior restrictions, which claimant exceeded for a period of several years, would have the

same undesired result. Claimants, able to return to work, would be discouraged from doing so for the fear of losing their entitlement to additional benefits in the future should they suffer additional injury. Claimant returned to work outside of his restrictions and was capable of performing his job outside those restrictions for a period of several years. This is an indication that in this instance, similar to Flores, the restrictions placed upon claimant in 1983 were excessive.

The Appeals Board finds that the Award of the Administrative Law Judge in granting claimant a work disability of 59.25 percent is accurate and appropriate and the Appeals Board adopts said Award as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Floyd V. Palmer dated August 11, 1995, granting claimant an award against respondent, Morton Buildings, Inc., its insurance company, Insurance Company of North America, and the Kansas Workers Compensation Fund, should be, and is hereby affirmed.

Claimant is entitled to 35.43 weeks temporary total disability compensation at the rate of \$299 per week totaling \$10,593.57, followed by 315.46 weeks permanent partial disability at the rate of \$283.42 per week totaling \$89,406.43 for a total award of \$100,000. As of January 2, 1997, there would be due and owing to claimant 35.43 weeks temporary total disability compensation at the rate of \$299 per week at the sum of \$10,593.57, followed by 195 weeks of permanent partial disability compensation at the rate of \$283.42 per week totaling \$55,266.90 for a total due and owing of \$65,860.47 which is due and owing in one lump sum minus amounts previously paid. Thereafter, the remaining balance in the amount of \$34,139.53 is ordered paid at the rate of \$283.42 per week until fully paid or until further order of the Director.

Pursuant to the stipulation of the parties, the Workers Compensation Fund shall bear 50 percent of the total award herein.

Claimant is awarded authorized medical expenses as set out in the original Award.

Claimant is awarded future medical treatment upon application to and approval by the Director.

Pursuant to the Award, credit is denied under K.S.A. 44-510a (Ensley).

Claimant is further granted unauthorized medical treatment up to the statutory maximum of \$350 upon presentation of an itemized statement verifying same.

Claimant's attorney fee contract is approved insofar as it is not in contravention to K.S.A. 1992 Supp. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent, its insurance carrier, and the Kansas Workers Compensation Fund to be paid as follows:

Ireland Court Reporting	\$344.41
Curtis, Schloetzer, Hedberg, Foster & Associates	488.88
Kelley, York & Associates, LTD	930.29
Don K. Smith & Associates	299.50

IT IS SO ORDERED.

Dated this ____ day of January 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Wichita, KS
Vincent A. Burnett, Wichita, KS
John C. Nodgaard, Wichita, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director